IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NOAH LANDFRIED, et al.,

Defendants.

Criminal Action

No. 19-8

Transcript of proceedings on January 17, 2020, United States District Court, Pittsburgh, Pennsylvania, before J. Nicholas Ranjan, District Judge

APPEARANCES:

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For Defendant R. Landfried:	James Paulick, Esq.
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For Defendant Novick:	Lee Markovitz, Esq.
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For Defendant Perry:	Patrick Nightingale, Esq.
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(Proceedings held in open court; January 17, 2020.)

THE COURT: We are here today in United States of America versus Landfried at Case 19-8. My understanding from Mr. Vahlsing is everyone has already taken attendance here, so entry of appearances won't be necessary because it will be made part of the record.

The first thing I would like to do is to hear argument on the motion for a bill of particulars -- I should say motions for bills of particulars filed by several defendants and then joined in by a number of other defendants.

As you have seen from the order I entered in this case, we have asked, Mr. Valenti, for you to take the lead on that motion, arguing here today for the motion for bill of particulars, but if anybody else from the defense side wants to make additional arguments, they are welcome to do so if you have joined in on the motion for a bill of particulars. But I would like to know now who may want to argue in addition to Mr. Valenti. Is there anyone else who thinks they might want to argue here today?

All right. Seeing nobody else, Mr. Valenti, why don't you start if you can addressing the motion for a bill of particulars and you can do so at counsel table if you prefer.

MR. VALENTI: Sure, thank you, Your Honor. Can everyone hear me?

To proceed today, there are multiple reasons for a

bill of particulars. Among the first reasons are the constitutional reasons, fair notice, due process, protection against double jeopardy. Those are the paramount concerns that a bill of particulars would protect in this case.

In addition to that, there are a number of practical concerns related to the trial preparation, streamlining this case, allowing future motions to be tied back to a specific document that educates everyone as to what the roles of the individuals are here.

In the government's own superseding indictment memoranda they state that the elements of the conspiracy charges that they need to prove include identifying that a person entered into an agreement and they entered into that agreement with at least one other person.

At its core, nothing in the indictment says who agreed with who. The conspiracy has not been defined as a classic wheel and spoke or pyramid conspiracy. The individuals that have worked together are the ones that really have to be brought to the forefront. In addition to that, dates and other key details are relevant.

The establishment of sufficient notice under the Constitution requires that the individuals being charged have an ability to prepare a defense. In a conspiracy charge, that's a crime that becomes very close to a thought crime without specific attention to the details of the dates, the

agreements, when somebody entered into a conspiracy, because that has legal effect as far as what crimes they're responsible for after the conspiracy. By definition, when a conspirator enters into a conspiracy, they are not responsible for what happened before they entered into the agreement.

Similarly, all of these arguments that protect the defendants' own constitutional rights have the practical effect of providing effective counsel. There's a Sixth Amendment right for the defendants to have effective counsel. In order for counsel to be effective, especially when there are limited resources for any law firm or defense attorney, particularly one going up against the United States government and the large number of resources that they have, particularizing the case does assist in providing that effective assistance of counsel, both by helping the attorney focus and by helping the defendant assist.

THE COURT: Now, what's your response to the government's position that at least informally they have helped, they have provided more discovery than they think they are obligated to provide, they've -- the government has argued that it has made itself available to address any questions, they have made effectively the equivalent of an opening statement to any particular defendant, and that should be enough -- I think that's one of their arguments -- how do you respond to that?

MR. VALENTI: Respectfully, the government does not give all of this information out of the goodness of its heart. They are forced to turn over exculpatory evidence under Brady versus Maryland, Giglio, and the progeny.

What has happened in the past is the government would turn over the specific information that they were going to use at trial and anything that could reasonably be foreseen as exculpatory.

After a series of high profile losses throughout the United States the government started to gravitate toward document dumps because they were tired of defense attorneys coming in and saying, you didn't turn over exculpatory evidence. Fine, we'll give you everything. That has now created the problem that we have today where massive document dumps, every scrap of paper has been turned over. To be sure, the labeling here is not intuitive.

In addition to that, being required to trust an adversary's labeling. Let's set aside that there may be bad agents or incompetent agents out there. Just from a clerical perspective, if you had the very best of intentions, you can't possibly label tens of thousands of documents accurately. Something will get missed. In having that large document dump and then saying, trust us, these are the three files you need to read, it undermines the adversary system, especially in this type of a case where many of the lawyers here were

appointed under the CJA and we're dealing with defendants who are educated about the system and feel very much that they want to get this in writing, why won't he tell me?

That gets me to the most important argument that we have is that the bill of particulars is a document with legally binding effect. It's the equivalent of an indictment or a stipulation or other filing that says, we are not going to go down this path or we will look at this theory and this theory.

The informal assurances regarding discovery, the willingness to help out, the Brady tension, all of that goes toward just one of the many reasons for the bill of particulars. That one reason is to assist an effective defense and trial preparation.

THE COURT: Now, let me ask you -- sorry to interrupt. Let me ask you this. Looking at the cases here, and the government makes this point, even in big drug conspiracy cases, their argument is that as a matter of law they don't have to give you much in the indictment. All they have to really do is lay out the elements of the offense essentially. I think they have argued they don't even have to list a specific controlled substance. They've listed them here, but they don't even have to. They don't have to list specific co-conspirators even. I think the law is that they can just say, your client conspired with somebody else, and

that's enough. But that they've, in this case, you know all the co-conspirators, the time frame for the conspiracy, at least generally, I think a period of years, and you know the specific controlled substances identified in Count 1 of the indictment.

What makes this case different than all the cases they have cited which indicate that that's enough and no bill of particulars is required?

MR. VALENTI: Well, some of these controlled substances were not controlled substances at all points in time during the conspiracy. If you are going to charge an analog, that is basically a drug that is like a controlled substance, but not specifically delineated as a controlled substance. McFadden is the case that requires that to be pled.

The government has the ability to plead around this, say -- I will use Patton as an example. Informally if they say they are only going to look Patton's conduct from October 2018 onward, we don't analog issues. But the indictment reads January 2017 when we do have analog issues.

So again we get back to, that's nice that we can get these informally assurances, but I have to take that back to a defendant and he is going to ask, well, why can we trust the government? Are they bound by this? My response to that must be, no, they are not bound by this.

Well, how do we get them bound by this? A bill of particulars.

Similarly, beyond the controlled substances, when we get into the nature of the specific conspirators, we have pointed to a number of cases where it gets into the idea of defining who you entered into the agreement with. It is one thing to say that there are a bunch of conspirators and there might be foreseeable conduct. But the element of who you agreed with is a separate element. You have to point to this specific person on this specific date that you entered into an agreement with.

Again, that's not something that necessarily comes down to the date and time. That can be proved inferentially at trial. But saying at some point in two years they agreed with one of these 45 people to do bad stuff is vague.

The issue then becomes, a bill of particulars really is a middle ground right here. If the indictment is vague, it essentially can be challenged at any point in time and the case would, in the worst scenario for the government, be dismissed with prejudice and criminal jurisdiction would not have properly attached.

Raising this argument is only prudent once the jury has been empaneled because that's when double jeopardy attaches.

So without a bill of particulars we run into a

scenario where the government has the risk that a bunch of defense counsel jump up the minute a jury is sworn in and move to dismiss the indictment because it is vague, which is prudent because, again, that's when double jeopardy would have attached and the government would lose the ability to cure with a superseding indictment.

Conversely, that's the exact reason none of us want to jump up right now and move to dismiss the indictment because we could do that and, similar to civil case law, you have a great motion to dismiss and then they just amend their complaint. The government has the ability to issue yet another superseding indictment.

If we're going to proceed under this indictment, a bill of particulars really is the moderate path forward to balance both the defense interest in moving to dismiss a vague indictment and bringing that body of case law into play and the government's ability to work around a number of issues by repleading and reindicting over and over again to cure its own defects.

THE COURT: Just backing up on the synthetics that -- and this might be even a question for Mr. Haller if he knows more than you -- but the synthetics in this case are, as I read the indictment, five synthetic cannabinoids pled in Count 1, is that right?

MR. VALENTI: Generally, yes. It is mostly

synthetic cannabinoids. There is another synthetic that's probably closer to fentanyl, but most of it is synthetic cannabinoids.

THE COURT: With respect to the synthetic cannabinoids that were not scheduled, at what point were they scheduled?

MR. VALENTI: Various dates. Some of them in January 2017, some of them in April, 2017. I think there was one that comes a little bit later.

Again, that's -- it will depend specifically on who is involved with which drug to kind of brief that issue, which is another reason a bill of particulars might be more appropriate first before we get down that path and anyone brings up those types of arguments because there will be clusters of defendants that want to speak to certain drugs and not others because those are the only drugs relevant to very specific people.

Again, tying it back to Mr. Patton, we have been focused on the synthetic cannabinoids because based on the government's representations, which we do trust -- well, counsel, Mr. Patton maybe not so much -- but like we said, that's been the focus for us. I can't speak today to some of the potential fentanyl or other type of equivalents that may be involved.

THE COURT: The government is saying that this

synthetic cannabinoids is a bit of a red herring. Let's say Mr. Patton, I don't know his conduct here, is -- he had some kind of agreement to distribute or arguably had an agreement to distribute synthetic cannabinoids which he didn't know to be the equivalent of a controlled substance prior to the point in which they became scheduled.

The government is saying, well, it doesn't really matter. Count 1 alleges a conspiracy to distribute a host of controlled substances in addition to the synthetic cannabinoids, and Mr. Patton would be, so long as there was an agreement, and the agreement had within its scope distribution of fentanyl, cocaine, heroin, even though he didn't have anything to do with it, it's in his possession, he is part of this agreement, it doesn't even matter, this whole controlled -- the whole analog/synthetic distinction is irrelevant, so to speak. Do you understand my question?

MR. VALENTI: I do. I would just disagree with the characterization. I do think it's highly relevant. One, for purposes of what has to be proved at trial, the knowledge becomes an element if it's an analog case. That's the clear holding in the Supreme Court in McFadden.

Separate and apart from that, the problem is that the conspiracy charges cocaine, heroin, everything else under the sun. And we get back to, do we have to prepare a defense against cocaine or can we trust the representation that your

guy doesn't have anything to do with cocaine?

Similarly, the conspiracy to distribute cocaine, let's go back to the government's own indictment memoranda, we can use either the document at Docket 4 or the later one for the superseding indictment. But under the indictment memoranda, the government notes that the United States must prove the following elements beyond a reasonable doubt:

And they say that the controlled substance was one of Schedule 1, 2, or 3 controlled substances listed in Count 1 of the indictment.

And if the controlled substance was cocaine or heroin, the amount of cocaine or heroin attributable to defendant as a result of defendant's own conduct and the conduct of conspirators that was reasonably foreseeable to the defendant was five kilograms or more of cocaine or one kilogram or more of heroin.

The drugs are treated differently. They have different elements, different things do need to be pleaded. And when you talk about a giant conspiracy reasonably foreseeable, it's a touchstone.

Let's presuppose -- again, we recognize everyone is innocent until proven guilty -- but let's presuppose someone does enter into an agreement to distribute synthetic cannabinoids and they enter into that agreement with three other people. If those people then go on to enter into a

second agreement, that is not part of the original conspiracy, that's a separate conspiracy.

The government has not indicted multiple conspiracies here. They have indicted one conspiracy. So everything that's done that traces back to any individual client has to be reasonably foreseeable under the actual agreement that they entered into. That's where we are completely lacking in detail. Who first agreed with who in this case to do what? Then who was brought in?

The government has tried to informally re-create the structure that their agents believe exists, and honestly I think there is a factual dispute. I think the government sees this as a pyramid conspiracy; I look at it more as a wheel and spoke. That's all in a separate factual debate.

But the core is the links between the conspirators and what is reasonably foreseeable by their own papers is something that the defendants are entitled to know ahead of trial to prepare to address that. Even if someone entered into a conspiracy to distribute certain drugs, it is not automatically foreseeable that every other crime committed by every other person in that agreement is attributable to them.

You may into an agreement to steal a car. You have no idea that five days later somebody is going to use that car to run somebody over. Maybe you do, maybe you don't. It gets into heavily, heavily contested factual issues. If we don't

know from a bill of particulars what those issues and what those connections are, it deprives of an ability to effectively prepare for trial.

More importantly, it undermines the double jeopardy issue. Let say that we, going back to Mr. Patton's example, we rely on the presumption that we're trusting the government that he is only involved in synthetic cannabinoids. We say nothing about cocaine at all. We get to a jury. He is acquitted. Then the government indicts him for a cocaine conspiracy that occurred with some of these same people at the same time. Is that barred by double jeopardy? We don't know. That's the significance of these issues here today.

THE COURT: I think I understand your argument. Before we turn to Mr. Haller, again, I would ask if any of the other defense counsel want to add or supplement anything Mr. Valenti said.

MR. PAULICK: Your Honor, James Paulick for Ross Landfried. I just want to address the Court. I filed a separate bill of particulars and I did note you wanted me to wait until after.

I would -- basically my arguments would be almost exactly the same as Mr. Valenti's. So if I can incorporate that for my own bill of particulars because I did not join his motion. I didn't want to stay silent.

THE COURT: No, I appreciate you raising that. I

know you filed a separate motion -- I am trying to remember the defendant's name. I think it's Jasek maybe filed another separate motion. I am fine if you just want to incorporate what he said. I just want to get all the arguments with respect to all the motions or joinders out now so that Mr. Haller can just respond in one fail swoop. So that's fine if you want to incorporate by reference what Mr. Valenti said here today.

MR. PAULICK: Right, Your Honor, and I would just like to add a few comments.

THE COURT: Go ahead.

MR. PAULICK: One of the things that in addition to everything that Mr. Valenti said very well is a judicial efficiency here. If we rely -- if all of us, especially us on the CJA panel, if we have to -- or everybody who's on the other side here, if we have to rely on a very vague -- let's say that it satisfies the requirements of indictment. Okay, that's fine, but we all have a job to do to defend our individual clients.

Although we are not asking for a bill of particulars that lists the time and location and what everybody said exactly how this conspiracy looked or maybe multiple conspiracies, as some of us think, if we all attacked this indictment, this one count of this giant conspiracy, we all have to look at every single tiny piece of these 10,000

plus documents in a very nebulous way, time-consuming way.

If we have a moderate approach where we have a bill of particulars, it places a modest amount of effort on one side where then it could illuminate the issues for all of us so that we can focus our defense appropriately for our individual defendant.

It would save time, it would save resources, and, quite honestly, it would avoid the double jeopardy issues and it would probably cut down on the number of appeals because if it's not granted, you know that this issue is going to continue and live on forever.

So on top of all of his arguments, I think there is an efficiency argument there as well. What are we really harming here by making the government stick to what their informal positions are into a formal letter? Yes, it does hold them to a certain degree, but we all could be held to certain standards in the law, and it is built into the law, it is built into the rules that this is to be granted in appropriate circumstances. I think that was outlined appropriately in both Mr. Valenti's and my motion and the other motions as well.

THE COURT: Let me ask you this. I guess I asked Mr. Valenti this question at the outset, but what you have said makes a lot of sense to me. But I know what the government -- and the government is going to get up and say,

really the purpose of a bill of particulars is to make sure that you are prepared for trial. Mr. Haller will probably say, Mr. Paulick, I can sit down with you and I can tell you exactly why your client is on the hook, what documents to look at. It may not be binding on the government, but it will make your life easier. Is really the only distinction that it is not boxing the government in so you and your client can't really trust what they say and will have to review the 10,000 files? Is that really the response? How do you respond to Mr. Haller saying it's informally through discovery, through a sit-down, through different statements you won't be surprised going into trial?

MR. PAULICK: Your Honor, the only thing I would say in response is I think the binding effect is of utmost importance. I don't think it is the only reason to require a bill of particulars, but it is a big one.

I trust when I'm dealing with Mr. Haller he is dealing with me in good faith, and that's fine, but I cannot rely on that good faith and take that to my client and say, here's what our strategy is going to be for trial because we can rely on the representations I had in private conversations with Mr. Haller. That's not going to fly. That's why we need this bill of particulars.

Especially for these clients who in this case -- and this a discretionary thing for a reason, these clients are

sophisticated. These guys have been studying law for ten years in lockup. They're not stupid. And in this kind of a case it's extremely important.

That's all I have, Your Honor.

THE COURT: Thank you, Mr. Paulick. Anybody else before I turn it over to Mr. Haller?

MR. DIETZ: Your Honor, just briefly.

THE COURT: What is your name?

MR. DIETZ: Martin Dietz. I am here on behalf Noah Landfried, but also standing in for Wendy Williams on behalf of Mr. Jasek.

Just for purposes of continuity, because you referenced this, Ms. Williams filed her own separate motion. She would adopt the arguments made by prior counsel today.

THE COURT: Thank you. I appreciate that, Mr. Dietz. Then over here.

MR. MARKOVITZ: Thank you, Your Honor, Lee Markovitz for Harold Novick. Just a couple quick points.

This indictment is a little bit different than most drug conspiracy indictments in federal court. There are so many defendants and so many controlled substances alleged.

The second thing is when you judge this motion, don't think about what the defense lawyer needs. Think about what the defendant needs. It is very different. To sit down with the prosecution and they'll say this and this and this to

a lawyer, think about the ability of a defendant to understand the nature of the charge against him because that's really the core of what this is about.

THE COURT: Okay. I appreciate that. Thank you.

Mr. Haller, if you would you like to respond to the various arguments, I would appreciate it.

MR. HALLER: Yes, Your Honor. I will stay seated so I can speak into the microphone.

THE COURT: Certainly.

MR. HALLER: Your Honor, Mr. Patton, Mr. Jasek, Ross Landfried, they want a bill of particulars to have the locking in effect to lock the prosecution into a theory of the case. I don't think there is any -- certainly not after what we just heard this morning, but even walking in here today it was obvious that's what this is at its core about.

Locking in the prosecution through a bill of particulars is an effect of a bill of particulars. It is not a justification for one. There has to be a separate justification for it.

There is no dispute in this case that ordering a bill of particulars can be a discretionary judicial act. The question is how much discretion the Court has and what would be an abuse of that discretion.

There is not as much discretion for this Court to order a bill of particulars, particularly -- it is not just a

bill of particulars. They're asking for specific things. You could order a bill of particulars; it is not something that just floats around in the air. It is actually something that orders the disclosure of information.

This isn't a court of like. This is a court of law. The defendants may like to have more information, but if the law doesn't justify it, they don't get that information, nor should they get that information.

The reason there's not as much -- not even close to as much discretion to just order a bill of particulars is because there's actually other law that specifically addresses what is specifically requested in these particular bill of particulars. Rule 7(f) of the Federal Rules of Criminal Procedure talks about bills of particular. But Rule 7(c) talks about what actually needs to be in an indictment. Rule 7(c) says that an indictment only needs to be a plain, concise, and definite written statement of the essential facts constituting the offense charged and does not have to allege the means by which the defendant committed the offense.

The essential facts of an offense are not a matter of discretion. It's not a matter of what a defendant would like to know. The essential facts are set by the law, set by the statute, the opinions, the case law interpreting the statute, and jury instructions.

THE COURT: With respect to the law as to what you

have to say in an indictment here in Count 1, is it your position that all that is required is essentially effectively just listing the four elements as you've done in the indictment memorandum and that would be sufficient?

MR. HALLER: It is absolutely our position that's true. Now, there are laws that I don't agree with. We could cite a whole bunch of categorical approach sentencing laws that I think are crazy. But because I don't agree with them doesn't mean that I get to disregard them or get my way.

I don't disagree or -- I fully understand why a defendant would like the law to be different. I mean, I may not agree with them, but I fully understand why they would. But that's not what this is about. That's a disagreement with what we need to prove and it's not a justification for a bill of particulars.

An 846 conspiracy does not require us to identify specifically who a defendant agreed with. We have to prove a defendant agreed to distribute in this instance a controlled substance. We don't have to do these things. We don't have to ever prove it. In fact, we don't even have to ever know it let alone state it before the trial even starts.

It would be an abuse of discretion to order the particular bill of particulars that these defendants are requesting also because -- and this might be the most specific reason why -- there's a rule that addresses discovery in

federal criminal cases, it's Rule 16. There is no general right to pretrial discovery in a federal criminal case. There is a rule that governs it. Rule 16 balances what needs to be disclosed, on occasion what the form of that needs to be, and what doesn't need to be disclosed pretrial.

That's really what -- when you actually look at what's being requested here, they're requesting additional discovery material under Rule 7(f) that is prohibited from being disclosed or ordered to be disclosed under Rule 16.

THE COURT: I mean, I would agree with that in part. I am not sure that all the requests -- I think a good deal of them look to be discovery type requests which would not be permitted.

I will tell you what -- maybe you can respond to maybe Mr. Valenti's argument as to when I asked him what makes this case different, he said the analogs really, I think that's really the heart of it. That has also given me pause as to you have an indictment that lists controlled substances, but covers a period in which some of those controlled substances were not scheduled controlled substances, but it appears the government would include those periods of time under an analog theory.

So I think Mr. Valenti's argument is, well, how can he prepare or other defendants here, how can they prepare for this trial when they don't know I guess the time -- really

it's the time of the agreement as it relates to the timing of when these substances became scheduled. Can you respond to that?

MR. HALLER: I can, Your Honor. I think to focus on the -- particularly something Mr. Valenti said earlier this morning, that he wants something in writing that confirms that the prosecution is not relying on these synthetic cannabinoids before they were scheduled. I say -- and this is why I don't think this is complex. It only becomes complex if you want to make it complex, and I think Mr. Patton has made it complex for himself. The indictment already states that in writing. If we were going to rely on these substances as analogs, we would have had to --

THE COURT: Cite the analog statute.

MR. HALLER: Cite the statute. And we didn't. I already stated that not just in numerous conversations, but I have stated that on the record. If my recollection is clear, I stated that on the record the last time we had a status conference with all counsel. And I repeat it here. But I shouldn't even have to repeat it really because it's stated in the indictment by not being stated in the indictment. We didn't charge a continuing criminal enterprise in this case either. We didn't charge a lot of things. We didn't charge this as an analog case.

So if we would try to rely on the analog status,

not the controlled substance status of these substances, we wouldn't be able to do that at trial. A jury instruction would easily address that. I am sure that the defense will request it. We will probably draft the instruction that we all agree on. We couldn't do that.

So I know there's five synthetic cannabinoids that are charged. It is not a mystery when they were -- one was scheduled in April of 2017, that's No. 7 listed there.

No. 8 was scheduled November 3rd, 2017.

No. 9 was scheduled February 5th, 2016.

No. 10 was scheduled July 10th, 2018.

No. 11 was scheduled July 10th, 2018, as well.

So could we have broadened the charge as an analog conspiracy as well? We could have. We did not. One of the reasons we did not is to make it less complex.

I mean, if I were in the shoes of a defendant, would I be more paranoid than I am? Yes, I would be, 100 percent. But that paranoia doesn't need to be indulged into requiring the prosecution to provide something in writing that is already provided in writing by not being in the indictment, which is a writing on the subject.

I mean, quite frankly, what's being requested in these bills of particulars is way beyond addressing just that issue. If there was a particular stipulation that those defendants that are worried about being prosecuted for the

analog status of these substances before they were scheduled, we could probably reach that stipulation and file it. I could sign it ten times. Whatever would need to be done I would be willing to do to get past this issue. I don't blame a defendant for being paranoid, but that's not a justification for what's being requested here.

THE COURT: I mean, I don't want to cut you off, Mr. Haller, but maybe I will ask Mr. Valenti this. You can pick back up, Mr. Haller.

It seems to me a stipulation on that would cure the harm, would it not? I mean, I will tell you, coming into this argument the concern I had was with the analog part of this. Because if the government was charging Count 1 as an analog, you would need to know -- you would definitely need to have more specificity as to the date of the agreement relative to when those substances became scheduled, and it may have affected your trial preparation because then maybe you need an expert, because an expert might talk about what are the psychotropic effects of the analog, are they the equivalent of the scheduled substance, it changes maybe your defenses in the case.

But if the government as represented on the record and would be willing to agree to a stipulation that the conspiracy does not extend to periods in which any of the substances were not scheduled, at least with respect to the

analog concern, isn't that enough?

MR. VALENTI: The issue of analogs is just one byproduct of the vague, non-particularized indictment. That is one problem and stipulations may be one way of dealing with it.

In addition to that, let's say we resolve the analog issue, we still have the representations that Mr. Patton was not at all involved in cocaine or in heroin. We need a separate stipulation for that because, again, he has the right to be apprised of what he needs to prepare for and the double jeopardy protection. We can't go all the way through this trial and then have cocaine brought in against him or he gets indicted again when they had their chance to indict him. And he is under this indictment part of a cocaine conspiracy even though the government has said he's not, that's not part of what he did.

Now, if Mr. Patton gets that, a number of other defendants need that. And then you go down the path of, well, now you are just doing a bill of particulars listing what every person is involved with, which drugs. We are not asking for exact weights and dates and things like that. But we do need some ordering of who started this, who came in, what drugs, who is attributable to which drugs, and can we accept in some manner that that's going to be binding on all parties.

If you want to jump back to Mr. Haller --

THE COURT: Yes, I appreciate that. Mr. Haller, I didn't mean to cut you off there, but I thought we could address at least that stipulation with respect to the analogs since you raised it. So if you want to respond and then continue in your argument.

MR. HALLER: Yes, Your Honor. I mentioned on the double jeopardy protection, the broader of the indictment actually provides greater double jeopardy protection for Mr. Patton because if we were to supersede or somehow narrow Mr. Patton to having not conspired to distribute specific drugs, that actually would -- I mean, this is entirely hypothetical and never likely to happen -- but it actually would reduce his ability to claim double jeopardy if he was subsequently indicted for distributing or conspiring to distribute one of the drugs that we limited out of this indictment. I see it completely the opposite way here.

But what I also see opposite, which I guess isn't surprising because we're not agreeing on things, but it is the justification that the legal justification that's stated as I think was referenced as a chorus of cases that support the issuance of a bill of particulars in this case. I actually believe that sometimes the process of trying to support an argument by referencing the law that's out there that's really not out there kind of proves the contrary of your argument. I think that's what's happened here.

I admire the attempt to try to find several, what I would consider as an advocate here, outlier kind of cases where bills of particulars were issued. But I think the fact that we have to refer to outlier cases instead of the many more applicable cases showing when bills of particulars were denied shows that there isn't a chorus of cases. The law doesn't support it.

It's not because you would need a perfect storm as it's referenced for there to be supportive case law on the issue of having bills of particulars issued. That's no different than any other type of motion, pretrial motion that's denied and then there's a trial and a conviction and then there is an appeal, which you could appeal -- defendants could appeal in this case or any case when a bill of particulars is denied.

The reason there isn't supporting cases is because the law just isn't favorable for it. And because it's a weak argument, in my opinion, it's not an argument that's made to the Third Circuit or these other circuits. It is actually the opposite. Those cases where a bill of particulars was issued over the prosecution's objection are the cases that you would almost need a perfect storm. In fact, you need an impossible storm because we can appeal those interlocutorily. And if we win, we obviously at trial we don't appeal; and if we lose, we can't appeal. So it is the other way around.

But I guess my main focus on critiquing the defense effort to support legally their motion is it seems that this United States versus Rosa case that is cited in the reply brief of Mr. Patton is really what a lot of effort is invested into. To elevate the Rosa case, a 1989 opinion from the Third Circuit, as the case that supports these motions, Mr. Patton goes so far as criticizing the prosecution for not recognizing that, quote, the analytical framework is what is meaningful, end quote, in Rosa.

I am not attributing improper motives at all to the defense for the manner in which Rosa is cited and discussed, but the manner that Rosa is cited and relied upon here is misleading and it's ultimately not persuasive at all.

The defense reference to Rosa as just a, quote, drug conspiracy case, end quote, is just not true. It's hard to miss that that's not true. It's not true in a way that completely changes the, quote, analytical framework, end quote, of Rosa.

Rosa was not just a drug conspiracy case. Rosa was a case that did charge a drug conspiracy, but it also charged a continuing criminal enterprise under Title 21 United States Code Section 848. The bill of particulars issue in Rosa involved the continuing criminal enterprise charge. A continuing criminal enterprise charge has a supervisory role as an element. It's completely different in that manner than

an 846 conspiracy.

That's why the issue came up in Rosa. It's not because of the drug conspiracy charge in there. I think that it is less than ideal that this was referred to as a drug conspiracy case in the reply brief because as it relates to the bill of particulars issue, we're talking about it was a continuing criminal enterprise case. The supervisory role was an element in that case and it's not an element in this one.

THE COURT: Let me ask you, Mr. Haller, to address two other things if you can. One, Mr. Paulick's argument just on the practical effects here and this being a middle ground and there are some practical benefits to a bill of particulars in terms of assisting defense counsel in preparation for trial. Then also Mr. Markovitz's point where he said this is not -- this case is not like your garden variety drug conspiracy case. So if you can address both those points.

MR. HALLER: I am happy to, Your Honor. In addressing Mr. Paulick's point, which these motions have been marketed as a way to reduce the number of pretrial motions and reduce possibly the number of trial defendants. I completely disagree. I don't see that granting the bill of particulars in this case reduces pretrial motions by one motion. I don't think granting these motions in this case will reduce trial defendants by one trial defendant. I actually think, if anything, granting the motions in this case will increase the

number of trial defendants.

Because I think what this is based on is -- and some of these defendants have been described as sophisticated defendants. And some of these defendants, I think the ones that are most staunchly behind this motion, want the law to be what they want the law to be and they want the facts to be what they want the facts to be.

There's been some degree -- I am not saying by defense counsel at all here -- but some of these defendants in attempting to manipulate this process, I don't think that -- I think granting this -- the whole reason they want this granted is to lock the prosecution in to gain an advantage at trial. I cannot see how indulging that motive is going to reduce the trial willingness of any of these defendants.

I mean, at most it's purely a matter of speculation how this could play out. The most important point is even it were true, even if this idea that there's -- it should be granted for pragmatic reasons about which we disagree, you can't not follow the law in order to reduce the number of pretrial motions or trial defendants.

So I don't think that ultimately the read on this is accurate --

THE COURT: I am not sure I understand Mr. Paulick is arguing that that should drive it. I think it was more of there are just a lot of documents, a lot of data, is this not

going to assist in limiting really what they need -- what defense counsel and the defendants really need to review to be prepared for trial as opposed to reducing the possibility of trial or pretrial motions?

MR. HALLER: Like I said, I don't think that -- ultimately I don't think that there is a lack of understanding about what each one of these defendants are charged with or what needs to be prepared for trial.

I think that what is wanted here is the lock-in. That's what is wanted here. That's really why a bill of particulars is such a -- it's not just an easy discretionary act that we shouldn't disagree with.

THE COURT: Okay.

MR. HALLER: I am trying to recall Mr. Markovitz's point.

THE COURT: Mr. Markovitz made a couple of points, but one of the points was that this is a very different type of drug conspiracy case that would warrant a bill of particulars.

MR. HALLER: That's right, I apologize. I think Mr. Markovitz makes a point there that it's different, and I agree, but I actually agree only to the extent that there's more detail in this conspiracy charge than there is in other ones. It's not that it's less detailed. There is more detail. We worked hard on this case. We were in some

respects very successful. We were able to identify many of the co-conspirators. We were able to list them in the indictment.

We were able to identify many of the drugs that they were conspiring to distribute. We were able to list them in the indictment.

This is not even close to the first multi, multi-defendant indictment we've had in this district. I mean, 48 defendants is a lot, and there's 46 in Count 1 that we are talking about here. We've had 30-some, 40-some defendant indictments before. We've had -- conspiracy indictments. And we've had these multidrug conspiracy indictments. There's nothing -- that doesn't make it unique.

I don't see this -- and the fact that Noah Landfried had customers, some of whom are incarcerated and some of whom are not, doesn't make it unique either. Sometimes we have suppliers of drugs who have customers who are in Pennsylvania and some have customers in other states as well. The fact that -- there are certain characteristics of this case, but nothing that makes it unique or vague.

As we tried to make the point in our response, if there's anything that sticks out, it's that there is more detail in this indictment in Count 1 than there is in other conspiracy indictments that we've charged, not less.

And not that this -- I state this just to kind of

give context to this issue in this district. We could have been doing something wrong in this district for the last 20 years. That doesn't mean this Court should continue to go along with it. But it is important to point out that granting a bill of particulars in this case is a statement that the tens of indictments like this that we've charged exactly this way shouldn't be charged that way anymore. And if they are, they need bills of particulars too because there's nothing unique except for maybe more detail being in Count 1 than less.

THE COURT: I wonder like in a civil context where you plead yourself out of court by putting more detail, providing more detail and providing more documents it raises more complaints -- I don't want to say "complaints," but arguments from the other side that a bill of particulars is needed versus a general indictment and providing the bare minimum. That's just an observation.

MR. HALLER: The way that the amount of discovery has complicated this process does make me wonder if we should just provide less discovery. What you would end up with I think is for those defendants who file pretrial motions or have a hearing or those defendants who go to trial, you would end up with instead of the large amount of discovery on the front end, you would have a large amount of Jencks material on the back end. So you would end up with trial scheduled or

hearing scheduled next week and now you have to review all of these Jencks documents which really were not discovery as it related to this particular defendant, but they are writings on the topic that this witness/case agent authored.

In the end I still think that over-providing discovery and working with the defense on reviewing it is just the way it should be. But I do think sometimes things become more complicated and you end up with hearings like this because of providing --

THE COURT: Too much.

MR. HALLER: Yes, too much information.

THE COURT: Okay. No, I think I understand your argument, Mr. Haller. I will give Mr. Valenti a chance to reply quickly.

MR. VALENTI: Sure. There's a number of points just picking up where we just were. There should not be a decision to sacrifice one constitutional right for another. If defendants have a right to Brady and Jencks material and they also have a right to prepare for trial and be protected against double jeopardy, it is not a trade-off. We laud the government for turning over Brady and Jencks material earlier than absolutely necessary because that does avoid a lot of these issues that they had before with withholding exculpatory evidence and even going to helping with trial prep.

But just because that process exists, that does not

mean that in order to get Brady and Jencks material at an earlier appropriate time we have to forgo using procedural options that will help further prepare for trial, further provide effective assistance of counsel, and further enhance double jeopardy rights. Constitutional rights just don't get bartered like that.

Going to the top, what the government started with very early on was saying that this Court has limited discretion, this is something that is a road that you might not want to go down.

Rosa, again, completely discounts that. It goes in painstaking detail through the history of Rule 7(f) and the bill of particulars. Since 1966, it has been entirely within the trial court's discretion for any reason. Before 1966, the defendants did have to show, quote-unquote, good cause to get a bill of particulars. Good cause is not that high of a standard, but it was a standard.

Since 1966, that's been taken out of the rule. So if you get rid of the good cause standard, it's like if you have got some type of reason, if it makes sense, if it helps, it's not good cause, it is a standard far below that truly within the discretion of the court.

Going to another point that the government made. They talk about the effect of the bill of particulars limiting, you know, locking in the government's case, but you

need the justification. To be clear, we do not need a good cause justification and haven't needed that since 1966.

Secondly, the justification is to protect constitutional rights, to ensure double jeopardy protection. As Mr. Markovitz said, to protect the defendant's right. Not the defense counsel's rights, not the rights of everyone else.

Yes, there are impacts on the government, there's impacts on the Court, there's efficiency arguments. But at the end of the day the most paramount rights that exist in most of the Bill of Rights are defendant's rights. That's what justifies the use of a bill of particulars.

The justification is protecting constitutional rights for due process, notice, fair opportunity, effective assistance of counsel, protection against being placed in jeopardy twice for the same offense, to really create that res judicata double jeopardy protection.

One of the other issues is the statement that the indictment can simply be listing the elements in the statute. There's a large body of case law that says you cannot just parrot the elements of a statute. That is not effective. We briefed some of that, we can submit supplemental briefing if we get to that, although that is more on the motion to dismiss phase. But parroting the elements of the statute is one of the key problems that leads to a lot of cases being dismissed.

Jumping down to the idea that this is something

being done to get an unfair advantage or to give defendants an advantage, it's not. The defendants are seeking fairness, not an advantage. They're seeking to be put in a position where their rights can be protected. This is not gaining an advantage or an unfair advantage. It's a process that exists to respect these rights.

Going back to Rosa, again, in the painstaking detail in which they walked through the history of the bill of particulars, in 1966 they wanted to encourage more liberal use of bills of particular. They wanted to give unfettered discretion to judges at the trial level. The Third Circuit has reinforced this in a number of cases to work through these types of issues, and nowhere is it more important than in conspiracy cases.

To say that Rosa is a continuing criminal enterprise case primarily and not a conspiracy case, both counts are there, it is a distinction without a difference. It gets back to the guts of Rosa talks about the standard entirely discretionary, not good cause. It talks about the rights to be protected, fairness, due process, trial prep, Sixth Amendment, effective assistance of counsel, double jeopardy.

And it talks about the general concept that if you get charged with a crime saying you agree to do bad stuff with other people and you help them do it, you should know who

those other people are particularly. It's not enough to say you and any one or more of these other 45 people did stuff. It's got to be more specific than that. It's not going to respect the rights of fair notice, sufficient preparation, double jeopardy to have something that broad.

Frankly, the government's arguments contradict themselves. They can't have it both ways. The indictment can't be so broad that it gives Mr. Patton all this extra double jeopardy protection, but it also cannot be so narrow that he is perfectly suited for trial preparation and he has got a nice focused document to jump through. Either we have to go through all the trouble of preparing for a cocaine case, because the indictment is so broad that it would prevent double jeopardy from attaching in a future cocaine case, so this is a cocaine case, or we have to go to the other side where, okay, we can leave cocaine off the table, but then, well, that's not that broad of an indictment.

Again, just reiterating Mr. Markovitz's points, this goes to the defendant's rights. This goes to their ability to prepare. This goes to their constitutional rights. Those are the justifications that require these procedures. And it is our job as advocates for these individuals to bring these arguments forward. It is not a manipulation of the system to ask for the process which is due.

THE COURT: All right. Thank you. I think, unless

the government has anything else to add, I think --

MR. HALLER: I do, Your Honor, but it will be brief.

THE COURT: I will give you the final word here.

MR. HALLER: Your Honor, Rule 7(f) is not the super rule. It doesn't trump every other rule that specifically address the subject.

So the idea that, recognizing the Court has discretion to issue of a bill of particulars, doesn't mean that the Court has discretion to not follow Rule 16. As there are with any laws, there are some that address subjects more specifically than others. This indictment does not just cite the statute. There are some indictments that do, and if you look at some of the outlier cases, that's where there's been bills of particulars. This indictment actually lists 46 defendants and the different controlled substances. So it does not just parrot. It simply doesn't. It does not just parrot the statute.

The statement I think that was made not just now, but in the reply brief, that there was a -- issuing a bill of particulars for this kind of information would not endanger witnesses I think is conclusory, and depending on what kind of information is being sought here is wrong.

I don't know how -- defense counsel would have to understand this -- how we would be able to identify some of

the specific information without really telegraphing who our cooperating witnesses are. I don't think that defense counsel is in a position to make the conclusory statement that was made that issuing a bill of particulars, specifically what's being requested here, would not endanger witnesses. It likely would.

Two other points and I'm done. To say that it is a distinction without a difference in Rosa that it was a continuing criminal enterprise versus a drug conspiracy case is just completely wrong. The only reason that that issue came up in a way that prompted the defense to cite it is because there's an element for a continuing criminal enterprise where the prosecution has to prove the supervisory role of the defendant. That's what that was about. Just read the opinion and it becomes apparent.

Finally, this is an issue of -- the defendants that are most in favor of this bill of particulars are those that understand what they're charged with. They just don't agree that they did that or don't want to accept responsibility for that, which is entirely legitimate. But that's what a trial is for. It's not what pretrial motion litigation is for.

Thank you, Your Honor.

THE COURT: Okay, thank you. Thank you to everybody for their very good arguments on that.

I am not going to rule on this today, but you will

get a ruling on the motions for bill of particulars shortly.

I would like to talk generally about the status of the case. I appreciate all defense counsel being present here today.

At the last conference we had, which was in October, I set a final pretrial motions deadline of March 10 and also a status conference for March 3rd, a week before the pretrial deadline.

With respect to pretrial motions, even though that's the deadline, if counsel believes that there are certain pretrial motions that ought to be filed and decided ahead of time, ahead of the deadline, such as this motion for a bill of particulars, including any motions that might -- motions on legal issues that currently might be an impediment to any plea discussions, they should be open to -- you can file ahead of the deadline. I wanted to make that clear for everybody.

At the March 3rd status conference, what I would expect to discuss would be any defendants who would be filing pretrial motions, to hear them in terms of what motions they intend to file, so it would be a preview. But the March 3rd deadline I am also setting as a deadline by which to schedule any pleas. So by that status conference if you haven't alerted the Court already, I expect anyone who is intending to plea to provide the Court with notice at that status

conference.

As you all know, under the sentencing guidelines for acceptance of responsibility there's the extra point for the early acceptance of responsibility. So by alerting me and scheduling a plea hearing before March 3rd, your client would be guaranteed that extra point. So please keep that date in mind.

Is there anything that any counsel here wants to or needs to address with the Court going forward with respect to scheduling or any other matters? Anything any counsel needs to raise today?

All right. Yes, sir.

MR. BURNEY: Your Honor, I don't know if you wanted to address today the motion that I filed regarding David Curran as far as requests for hard copies of discovery.

THE COURT: Yes. Remind me what your name is again, sir.

MR. BURNEY: Alonzo Burney representing defendant David Curran.

THE COURT: We can address it today. I think I ordered the government to respond to that, and I can't remember if -- did you file a response, Mr. Haller?

MR. HALLER: We did yesterday afternoon, Your Honor.

THE COURT: I didn't have a chance to review it

yet. So I don't know if it's necessary to address it here on the record. I have your written responses. I can just decide it and issue an order in due time.

MR. BURNEY: Okay.

THE COURT: Thank you. Anybody else have anything to raise today with the Court?

Again, March 3rd status conference, I am going to issue an order today setting the time for that at 2 p.m. on March 3rd. Then March 10th is the pretrial motion deadline. As I said at the last status conference, that deadline will not be moved.

Then if there are no pretrial motions filed by March 10th, we will set a trial date. And I at that point would likely ask the government and defense to submit a trial plan of some kind to see how we could try this case, whether it's in phases or piecemeal or what have you.

MR. HALLER: Thank you, Your Honor.

THE COURT: All right. Thank you, everybody.

While you are milling out, just to make the record clear, I am going to order a copy of this transcript with the costs to be split between the government and the CJA lawyers. Thank you.

(Record closed.)

C E R T I F I C A T E

I, Richard T. Ford, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

S/Richard T. Ford _____